IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LINK TREASURE LIMITED, a company organized and existing under the laws of the British Virgin Islands,	)	
Plaintiff,	)	CIVIL ACTION FILE
v.	)	NO. 1:06–cv–1930
BABY TREND, INC. a corporation organized and existing under the laws of the state of California,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AND AUTHORITIES IN OPPOSITION TO MOTION TO STRIKE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AS UNTIMELY

Plaintiff Link Treasure Limited ("Link") files this memorandum of points and authorities in opposition to Defendant's Motion to Strike Plaintiff's Motion for Preliminary Injunction as Untimely (the "Motion"), respectfully showing this Court as follows.

I. PRELIMINARY STATEMENT

In the Motion, Defendant asserts that Link's preliminary injunction motion ("PI Motion"), which could not have been filed before the deadline set forth in the

Preliminary Report, is untimely and should be stricken. Defendant's Motion, however, is without merit.

Defendant's Motion is procedurally flawed. It is beyond purview in this jurisdiction that motions to strike may only properly be addressed to challenged defects in pleadings. To be sure, Defendant's objection to the timeliness of the PI Motion must be addressed in Defendant's response to that motion, not asserted through a separate motion to strike. Indeed, according to Defendant's "logic," Link should file a separate motion to strike Defendant's Motion, asserting this procedural defect. This Court's well-settled precedent (and common sense) dictate otherwise.

Defendant's substantive arguments in support of the Motion are equally ill-founded. In an effort to avoid addressing the obvious merits of the PI Motion, Defendant claims prejudice from the "untimely filing" of the PI Motion. First, Defendant asserts that the motion prejudiced Defendant's ability to respond to this Court's LPR-required non-infringement and invalidity contentions. Defendant also contends prejudice from the fact that Defendant has sought to transfer this action.

Defendant's claims of prejudice from the PI Motion are simply disingenuous. Defendant has responded to this Court's LPR-mandated disclosures, without requesting additional time from Link to do so and apparently without any manifest prejudice from the pendency of the PI Motion. Likewise, Defendant's speculation about the Court's being "sidetracked" from Defendant's transfer motion—which Plaintiff's briefing has shown to be without merit—denigrates the Court's ability to consider both Defendant's motion to transfer and the PI Motion. Link believes this Court to be capable of evaluating the merits of both motions.

As more fully set forth below, Defendant's Motion should be denied.

II. PROCEDURAL HISTORY AND SUMMARY OF RELEVANT FACTS

On August 21, 2006, Link caused service of the original complaint instituting this action to be made upon Defendant. (Return of Service, Docket # 2).[1] On September 8, Defendant submitted a consent order granting Defendant a thirty-day extension of time to respond to the Complaint (Stipulation, Docket #4), which the Court granted (Order to Extend Time to Answer, Docket#5). Defendant served its Answer and Counterclaim on October 11 (Answer and Counterclaim, Docket #6) and its first Amended Answer and Counterclaim on October 24, 2006 (Amended Answer and Counterclaim, Docket #9).

[1] Unless otherwise stated, all docket references are to the docket in this action.

On November 3, Defendant filed its motion seeking to transfer this action to the United States District Court for the Central District of California. (Motion to Transfer Venue, Docket #12).[2]

On November 13, the parties filed their Joint Preliminary Report and Discovery Schedule. (Joint Preliminary Report and Discovery Schedule, Docket #14). In its initial disclosures filed that same day, Defendant raised for the first time an issue regarding standing and an assignment of one of the patents-in-suit. (Defendant's Initial Disclosures, Docket # 13). Link investigated the merits of the standing issue and, determining that a valid assignment of the '057 Patent had occurred, instituted a second action on November 28 in which Link asserted infringement of the '057 Patent against Defendant. (Complaint, U.S.D.C., ND Ga, Civ. Act. No. 1:06-CV-2867, Docket #1). Link caused service of the Complaint in this second action to be effectuated on December 5. (Return of Service, U.S.D.C., ND Ga, Civ. Act. No. 1:06-CV-2867, Docket #2).

Thereafter, the parties discussed the consolidation of the two pending actions, with the parties agreeing to the filing of an amended complaint in this action consolidating the claims. On December 12, Link filed it's motion to amend the complaint. (Unopposed Motion to Amend Complaint, Docket #24). On December 15, the Court granted Link's motion to amend.

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[2] Defendant's transfer motion was submitted to chambers on December 4. (Submission of Motion to Transfer, No Docket #).

On January 3, 2007, Defendant filed its answer and counterclaim to Link's amended complaint. (Answer and Counterclaim, Docket #31). That same day, Link filed the PI Motion. (Motion for Preliminary Injunction, Docket # 32). On January 4, counsel for Plaintiff notified Defendant as a matter of professional courtesy that Plaintiff would not—contrary to the parties' established prior practice—consent to a request for extension of time to respond to the PI Motion.

On January 9, Defendant filed the Motion. (Motion to Strike Motion for Preliminary Injunction, Docket #33).

On January 19, Defendant timely served its contentions regarding invalidity and non-infringement pursuant to LPR 4. (Certificate of Service, Docket #36)

III. POINTS AND CITATIONS OF AUTHORITY

A. Defendant's Motion Is Procedurally Flawed.

It is well-settled that motions to strike may only be directed to purported defects in pleadings. *See, e.g., Smith v. Southeastern Stages, Inc.*, 479 F. Supp. 593, 594 (N.D. Ga. 1977). Whatever may be the practice in other forums, this Court adheres to the requirement that motions to strike are only properly directed to pleadings, as defined by Fed. R. Civ. P. 7, and motions and their supporting materials are clearly outside of that definition. *Id.* As Judge O'Kelly explained, if there is an objection to a technical defect in a motion, the respondent must

> register its objection to the movant's materials by way of the material submitted in opposition to the motion. The court will then implicitly rule upon these objections in consideration of the motion.

Id. (internal citations and quotes omitted). *Accord Newsome v. Webster*, 843 F. Supp. 1460, 1464 (S.D. Ga. 1994); 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 12.37(2) (3d ed 2006).

Accordingly, Defendant's Motion is procedurally flawed and should be denied.

B. Defendant's Timeliness Arguments And Claims of Unfair Prejudice Should Be Rejected

In support of its Motion, Defendant argues that the PI Motion is untimely and that Defendant has suffered unfair prejudice as the result of the PI Motion. Defendant's arguments are without merit.

First, Defendant's arguments regarding the timeliness of the filing of the PI Motion ignore one key fact—the PI Motion could not have been filed within the time period for filing of motions set forth in the parties Joint Preliminary Report and Discovery Schedule. This Court did not grant Link's Unopposed Motion to Amend Complaint, which corrected the ownership of the patent upon which the PI Motion is based, until December 15—two days after Defendant contends the PI Motion should have been filed.[3] Link filed the PI Motion approximately 2 weeks later, a time period including the Hanukkah, Christmas and New Years holidays.

In any event, to the extent that leave of Court is deemed required under L.R. 7.1A, ND Ga, the facts and circumstances here required the filing of the PI Motion after the December 13 deadline argued by Defendant and Link respectfully requests that the Court grant Link leave to have filed the PI Motion and to consider its clear merits.

Defendant's claims of prejudice are equally ill-founded. Defendant contends that it has suffered prejudice by reason of the filing of the PI Motion by (i) "distracting" Defendant from its obligations to provide its non-infringement and invalidity contentions and (ii) "sidetrack[ing]" this Court's consideration of Defendant's transfer motion. Even a cursory review of these claims establishes that Defendant has suffered no ***unfair*** prejudice by reason of the filing of the PI Motion on January 3.

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[3] Defendant apparently contends that Link should forfeit its right to file the PI Motion because Link consented to the consolidation of Civ. Act. No. 1:06-CV-2867—in which the infringement claims upon which the PI Motion is based were pending—with this action through the filing of an amended complaint. The consolidation of these two actions promotes judicial efficiency and is in the best interests of all parties. Link should not forfeit its right file the PI Motion simply because the deadline passed before the Court granted the consolidating amendment—particularly where, as here, no unfair prejudice results.

First, Defendant's claims of distraction regarding its LPR 4.2 and LPR 4.3 obligations appear questionable, at best. Defendant has known of its obligations to provide its non-infringement and invalidity contentions since—at the very latest—October 26, 2006, when the parties conducted their Rule 26(f) conference and discussed modifications to the Court's deadlines set forth in the Local Patent Rules. It strains credulity to argue that the filing of the PI Motion somehow impeded in any material respect Defendant's preparation of these materials, particularly given the Court's granting of Defendant's request to extend the date for its response to the PI Motion until after the Court's ruling on this Motion. Moreover, at no time did Defendant contact counsel for Link to indicate any desire for more time to respond to the LPR obligations. It is therefore not surprising that Defendant timely served its LPR contentions on January 19. Given these facts, Defendant has not and cannot establish any unfair prejudice arising from its LPR obligations and Link's filing of the PI Motion on January 3.

Although less than pellucid, it appears that Defendant also contends that this Court should stay this action pending resolution of Defendant's motion to transfer.[4] Apparently, Defendant believes the Court is unable to evaluate the merits of both

[4] Link is unclear as to exactly what matters Defendant contends will "sidetrack" the Court and, accordingly, what the parameters of Defendant's de facto stay should be.

the PI Motion and Defendant's motion to transfer, stating that the Court will be somehow "sidetracked" by the PI Motion and that this distraction will prejudice Defendant. Again, however, Defendant has not and cannot establish that this alleged prejudice arises because of Links' filing of the PI Motion on January 3. The motion to transfer was submitted to chambers on December 4. Apparently, then, Defendant's claimed "sidetracking of the Court" prejudice would have arisen if Link filed the PI Motion at any time after this date—even if the filing would have been before December 13.

In any event, Link has more faith in the Court's ability to analyze the merits of the various motions pending and does not believe that Defendant's motion to transfer—which Link's briefing has shown to be without merit—should act as a de facto stay of all proceedings in this action until rejected by the Court.

Simply put, Defendant can establish no ***unfair*** prejudice attributable to the filing of the PI Motion on January 3, rather than December 13,[5] and the Motion should be denied.

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[5] Indeed, had Link filed the PI Motion on December 13, Defendant's response would have come due on December 29, requiring Defendant's counsel to work through the holidays. This would appear to be far more unfairly prejudicial to Defendant.

IV. CONCLUSION

As set forth above, Defendant's Motion is procedurally ill-founded and substantively without merit. Based upon the foregoing points and authorities, Defendant's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.1D, the undersigned counsel certify that the foregoing brief has been prepared in Book Antiqua 13 point, one of the four fonts and points approved by the Court in LR 5.1B.

This 29th day of January, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2007, a true and correct copy of the foregoing Plaintiff Link Treasure Limited's Memorandum Of Points And Authorities In Opposition To Defendant's Motion To Strike Plaintiff's Motion For Preliminary Injunction As Untimely was caused to be filed electronically via CM/ECF in the United States District Court for the Northern District of Georgia, with notice of same being electronically served by the Court, as follows:

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